Supreme Court, U.S.
FILED
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79-1185

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

FERNANDO J. MONTILLA AMBROSIANI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes	3
Constitutional Amendments	3
Statement of the Case	4
Reasons for Granting the Writ	5
Conclusion	6
Appendix A—Judgment of the Court of Appeals	1a
Appendix A-1—Opinion of Affirmance	2a
Appendix B—Denial of Petition for Rehearing	10a
Appendix B-1—Per Curiam Opinion of Denial of Rehearing	11a
Appendix C—Extract of Petitioner's Brief to the Circuit Court	14a
Appendix D—Extract of Petitioner's Application to the Circuit Court for Rehearing	21a

CASES CITED

Jeffers v. U.S.A., 392 F.2d 749..... 5

United States v. UCO Oil Co., 546 F.2d 833, cert. denied, 430 U.S. 966..... 5

STATUTES CITED

18 USC 152..... 1

CONSTITUTIONAL AMENDMENTS

FIFTH..... 3

SIXTH..... 3

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1979
No.

FERNANDO J. MONTILLA AMBROSIANI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit, entered in the above entitled case on December 12, 1979 which affirmed the judgment of conviction of the District Court of Puerto Rico (Pasquera, D.J.) based upon a finding of guilt by a jury. A timely petition for rehearing was denied on January 2, 1980 and the Court of Appeals directed the mandate to issue forthwith.

Petitioner, the President of a corporate debtor in possession pursuant to 11 U.S.C. 742, was convicted under 18 U.S.C. 152 of (a) one count of concealment of assets and (b) eight counts of making false entries.

Petitioner was sentenced to concurrent terms of im-

prisonment of one year and a day under counts 1 and 2; suspended sentences on counts 3 to 9; two years probation, fined $10,000.; and to render eight hours per week of community service during the first year of probation.

OPINION BELOW

The opinion and order of affirmance by the Court of Appeals, as yet unreported, are included herein as Exhibits "A" and "A-1." The motion for rehearing and the decision of denial thereof by the Circuit Court are included herein as Exhibits "B" and "B-1."

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 12, 1979, (Appendix A, and A-1 infra pp. 1a id. The petition for rehearing was denied on January 2, 1980. (Appendix B, and B-1 infra, pp. 10a id).

Petitioner has been directed to call the U.S. Marshal, Miami, Florida for a date to report to Eglin Air Force Base, Florida not later than February 7, 1980 to commence his incarceration.

No extension of time has been granted within which to file this petition.

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(i) and Rule 22(2) and Rule 19 of the Supreme Court Rules.

QUESTIONS PRESENTED

1. Did the District Judge err in attempting to correct an indictment which had been found to be defective by the Circuit Court, by changing the language thereof? We say "Yes."

2. Can a District Judge change the language of an indictment in an attempt to cure its basic defect of being multiplicitous? We say "No."

STATUTES
(in pertinent part)

18 U.S.C. 152 "Concealment of assets; false oaths and claims; bribery." The pertinent paragraphs of this section are the following:

(1) "Whoever knowingly and fraudulently conceals . . . any property belonging to the estate of a bankrupt;"

(3) "Whoever knowingly and fraudulently makes a false declaration, certificate, verification, or statement . . . in or in relation to any bankruptcy proceeding;"

CONSTITUTIONAL AMENDMENTS
(in pertinent part)

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . .

STATEMENT OF THE CASE

The petitioner as principal officer of the corporate debtor in possession was acting in a fiduciary capacity. The evidence indicated that he deposited certain of the bankrupt corporation's receipts in his personal account and did not report them. The amount of the concealment alleged in Count 1 is the sum total of the unreported portion of the monthly receipts charged in Counts 2-9. Petitioner was charged in Count 1 with "concealment" and in Counts 2-9 with making false monthly reports.

The Circuit Court held that it was inappropriate for an indictment to allege two offenses and impose two convictions as the result of one set of facts, all of which are essential elements of each crime. That Court also pointed out 11 U.S.C. No. 1 (7) of the Bankruptcy Act defines "Conceal" as including falsify. Moreover that Court stated that "presumptively Congress favors a single punishment for a single result, the method of accomplishment being merely incidental.

However the Circuit Court held that the multiplicity of Count 1 of the indictment was effectively removed by the Trial Judge in a side bar discussion with counsel wherein he treated the dollar amount in Court 1 as irrelevant and construed Count 1 of the indictment as merely charging the petitioner with concealment of funds in his personal checking account.

The Circuit Court went on to criticize the government and the indictment and closed its opinion of affirmance with these words:

"We hope we do not see a case like this again!"

A motion for rehearing was made upon the grounds that the Circuit Court disregarded petitioner's rights of due process and his rights to be charged by a grand jury

under the Fifth Amendment and his right to confrontation and be advised of the nature of the charges against him under the Sixth Amendment. Simply stated, petitioner contended that the grand jury's indictment, which was defective due to multiplicity, could not be varied or amended by the Court.

The Court of Appeals denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

Count 1 of the indictment was multipitous with the other eight counts. The concealment charged in Count 1 included the falsity of the reports charged in Counts 2-9.

United States v. UCO Oil Co., 9 Cir., 1976, 546 F.2d 833, *cert. denied,* 430 U.S. 966. There the court held that a report, false in that it understated both directly and indirectly, did not constitute two crimes, i.e., a misstatement and a concealment, even as to the indirect concealment. The court said at 837,

> "[T]he government charges that the making of a report which falsely states total gallons sold may also result in a device by which the true price per gallon is concealed. Reason and fairness support the conclusion that only one offense is charged."

The Court of Appeals agreed.

The "suggestion" by the Trial Judge to disregard the dollar amount recited in Count 1, did not and could not cure the defect of multiplicity.

In any event such suggestion constituted a fatal variance with the indictment as presented by the Grand Jury and a preemption of the sole and exclusive function of the Grand Jury.

Jeffers v. U.S.A., 392 F.2d 749, wherein the Court stated:

"Neither this court nor the trial court is free 'to change the charging part of an indictment to suit its own motions of what it ought to have been, or what the grand jury would probably have made it if their attention has been called to suggested charges.' "

The arguments presented by petitioner to the Court of Appeals in his appeal brief (App. "C" infra pp 14a id) and his petition for rehearing (App. "D" infra pp 21a id) are incorporated herein by reference.

The indictment was defective and could not be cured by the Trial Judge.

The criticism of the indictment and prosecution by the Circuit Court should have inured to the benefit of the petitioner, and not only to unnamed future offenders who would be protected from such an indictment.

CONCLUSION

The issues discussed herein are of sufficient substantiality to require a review by the United States Supreme Court.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"
JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1058

UNITED STATES OF AMERICA,

Appellee,

v.

FERNANDO J. MONTILLA AMBROSIANI,

Defendant-Appellant.

JUDGMENT ENTERED 12/12/79

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows:

The judgment of the District Court is affirmed.

By the Court:

s/Dana H. Gallup, Clerk

cc: Messrs. Klein and Tellechea

APPENDIX "A-1"
OPINION OF AFFIRMANCE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1058

UNITED STATES OF AMERICA,
APPELLEE,
v.
FERNANDO J. MONTILLA AMBROSIANI,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[HON. HERNAN G. PESQUERA, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH and BOWNES, *Circuit Judges*.

Irwin Klein, for appellant.
Alberto Tellechea, Assistant U.S. Attorney, with whom *Jose A. Quiles*, United States Attorney, was on brief for appellee.

December 12, 1979

ALDRICH, *Senior Circuit Judge*. Defendant, the president of Montilla Records of Puerto Rico, Inc., a debtor in possession pursuant to 11 U.S.C. § 742, was tried and convicted on a nine count indictment charging violation of 18 U.S.C. § 152, "Concealment of assets; false oaths and claims; bribery." The pertinent paragraphs of this section are the following.

> (1) "Whoever knowingly and fraudulently conceals ... any property belonging to the estate of a bankrupt;"
>
> (3) "Whoever knowingly and fraudulently makes a false declaration, certificate, verification, or

> statement ... in or in relation to any bankruptcy proceeding;"

Count 1 was filed under paragraph (1).

> *Count 1.* Commencing on or about March 14, 1977, up to and including December 31, 1977, defendant knowingly and fraudulently concealed from the bankruptcy court and creditors $44,355 of receipts from sales.

The subsequent eight counts were filed under paragraph (3).

> *Count 2.* On or about June 6, 1977, defendant knowingly and fraudulently made false entries in documents submitted to the bankruptcy court by failing to report sales or earnings in the approximate amount of $2,766 for the month of May, 1977. *Count 3.* Same as Count 2, except August 10, 1977, $3,361, and month of June. *Count 4.* Same as Count 2, except August 10, 1977, $1,052, and month of July. *Count 5.* Same as Count 2, except October 6, 1977, $2,824, and month of August. *Count 6.* Same as Count 2, except October 6, 1977, $6,138, and month of September. *Count 7.* Same as Count 2, except February 13, 1978, $3,405, and month of October. *Count 8.* Same as Count 2, except February 13, 1978, $2,539, and month of November. *Count 9.* Same as Count 2, except February 13, 1978, $1,629, and month of December.

Thus, while Count 1 alleges concealment, between March 1977 and December 1977, of receipts from sales in the amount of $44,355, Counts 2-9 allege that between the dates of June 1977 and February 1978 defendant made false entries in documents of sales or earnings for the months of May 1977 to December 1977, inclusive, in amounts totalling $23,716.

On the eleventh day of trial, after the government had rested, defendant moved that all the evidence be struck, and for acquittal, on the ground that the indictment was

multiplicitous. The court denied both motions, except that it ordered defendant acquitted on Count 10 on the ground that Count 10 was multiplicitous in light of Count 1. Count 10 read as follows.

> "*Count 10.* That on April 13, 1977, . . . defendant . . . did knowingly and fraudulently make false oath or accounting . . . by failing to disclose deposits of money of the bankrupt in bank accounts other than that listed in the Statement of Affairs for bankrupt filed in the bankruptcy proceedings . . . ."

On the government's announced theory this charged nondisclosure, in violation of paragraph 9 of section 152.[1] Thereafter the jury found defendant guilty on the remaining counts. The court imposed sentences of a year and a day on Counts 1 and 2, to be served concurrently, and suspended imposition of sentence on Counts 3 - 9.

On this appeal defendant raises a number of objections which we find inconsequential.[2] However, we are much concerned with the indictment, which defendant in his brief asserts was either "duplicitous or multiplicitous." During

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[1] "Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt."

[2] The fact that defendant filed the reports unsigned, and only signed them later, when the omission was called to his attention by the clerk, does not mean that he was "overreached and entrapped by the government's action in forcing his signature." Next, the burden was not on the government to show that its evidence was not tainted. Again, the fact that defendant's prior attorney withdrew after a magistrate had recommended he do so, but before the court had passed on the recommendation, did not mean that defendant was wrongly deprived of effective assistance of counsel. Next, the court acted within its proper discretion in summarizing the evidence after a several day interruption of the trial. Nor was the government, in introducing charts summarizing its accounting evidence, required to include other, separate matters which defendant relied on to show overall good intent.

the trial both of these terms were used, sometimes inaccurately and sometimes interchangeably. At one point, when the court used both, counsel interrupted, saying, "No, we are not arguing duplicity, sir, just multiplicity." We will stay on that route.

Defendant assumed his fiduciary position in charge of the bankrupt's business in March, 1977. Commencing with the month of May he was obliged to, and did, file monthly reports, but he was, of course, required also to account for monies received previously. On the government's evidence defendant deposited certain of the bankrupt's March and April receipts in his personal bank account and did not report them. From May on, in each monthly report, defendant understated current receipts. Counts 2 - 9 covered these false reports; Count 10 covered the failure to report the March and April deposits.

So far, so good. We do not fault individual counts for each of the monthly reports in spite of defendant's claim that they were all part of one transaction. *United States* v. *Bernstein*, 2 Cir., 1976, 533 F.2d 775, 786, *cert. denied*, 429 U.S. 998; *Bins* v. *United States*, 5 Cir., 1964, 331 F.2d 390, 393, *cert. denied*, 379 U.S. 880. The unreported bank deposits in Count 10 were properly a separate matter. The trouble came with Count 1. As the government conceded while opposing defendant's motions, and concedes now, the $44,355 figure in that count is the sum total of the undisclosed March and April bank deposits charged in Count 10 and of the unreported portion of the monthly receipts charged in Counts 2 - 9. With respect to the March and April bank deposits there is complete redundancy—defendant is charged in Count 1 with concealing them, and in Count 10 with failing to disclose them. This is but another name for the same rose. The government's reliance on *United States* v. *Gordon*, 2 Cir., 1967, 379 F.2d 788, *cert. denied*, 389 U.S. 927, is misplaced. There there was

an alleged fraudulent transfer of assets as well as concealment. In the case at bar the government disclaimed charging any impropriety in making the deposits, and charged only nondisclosure.

Logically, the false reports stand no better. According to the government, it is one crime to conceal a receipt, and another to file a report that is false because the receipt is omitted. To put it baldly, as the government did at the side bar during trial, saying that one has $5 when one has $10 is both a false statement and a concealment, and thus two separate offenses. Possibly the Bankruptcy Act itself, which defines "conceal" as including "falsify,"[3] is the short answer to this. However, even without the Act we could not agree with the government.

The government says, correctly, that the separate paragraphs of section 152 state separate crimes that may be indicted separately. This does not answer the question whether it is appropriate to allege two offenses and impose two convictions as the result of one set of facts, all of which are essential elements of each crime. We find the government supported by only one case, which, incidentally, it failed to cite. In *United States* v. *Schireson*, 3 Cir., 1940, 116 F.2d 881, the court held that filing a false report justified convictions both under paragraph one and paragraph three. It said, at 884,

> "Defendant was indicted both for concealment and making a false oath. Making a false oath is an offense in itself. If the false oath also constitutes concealment it is arguable that there is a double punishment for the same act. One answer to this is that a man may frequently suffer two penalties for the same act if that act is the means of committing two offenses. If he kills two birds with one stone he can well be punished for killing each bird, if killing birds is an offense."

[3] "'Conceal' shall include secrete, falsify and mutilate." 11 U.S.C. § 1(7).

The court cited no authority, either for its holding or for its analogy. The analogy is incorrect. *Ladner* v. *United States*, 1958, 358 U.S. 169 (injuring two federal officers by one discharge of a shotgun is a single offense); *cf. Bell* v. *United States*, 1955, 349 U.S. 81 (interstate transportation for immoral purposes of two women in one automobile is a single offense). Although *Ladner* and *Bell* demonstrate that the *Schireson* court engaged in loose analysis, they do not, themselves, contradict its holding, as they involved plural numbers and a single statute, while in *Schireson*, and here, there was a single set of acts and plural statutory provisions. However, their rationale is broad enough to demand the same result: presumptively Congress favors a single punishment for a single result, the method of accomplishment being merely incidental. Even more in point is *Heflin* v. *United States*, 1959, 358 U.S. 415 (bank robbers not to be separately punished for both taking and receiving the stolen property).

A case opposed to *Schireson*, and to the government's position here, is *United States* v. *UCO Oil Co.*, 9 Cir., 1976, 546 F.2d 833, *cert. denied*, 430 U.S. 966. There the court held that a report, false in that it understated both directly and indirectly, did not constitute two crimes, *i.e.*, a misstatement and a concealment, even as to the indirect concealment. The court said, at 837,

> "[T]he government charges that the making of a report which falsely states total gallons sold may also result in a device by which the true price per gallon is concealed. Reason and fairness support the conclusion that only one offense is charged."

We agree. We add that the government's claim of different elements in the case at bar is factually incorrect, and its dissertation on res judicata irrelevant.

Unfortunately, when the defendant first raised the question of multiplicity during trial, perhaps because counsel complicated matters by claiming Counts 2 - 9 were themselves multiplicitous, the court may not have recognized all of the indictment's defects. At one point it seemed to accept the government's entire argument that concealment and false reports, even of the same receipts, were separate offenses. However, the court ultimately took the position that by treating the dollar figure in Count 1 as irrelevant, Count 1 was to be construed as charging defendant simply with concealing the March-April funds in his personal checking account, hence no multiplicitous with respect to Counts 2 - 9 and no longer multiplicitous with respect to Count 10. On this stated basis the court denied defendant's motions.

The defendant did not see fit to order a transcript of the charge, or of the exceptions taken thereto, if any. Accordingly, on this appeal, the burden being on defendant to show error, we assume that in putting the various counts to the jury the court continued the distinction that it had articulated to counsel. The distinction was reasonable, as well as practical. Hence, on the record before us, there was no multiplicity in the jury's consideration, or in its verdicts. Correspondingly, there was no prejudice in the concurrent sentences. *United States* v. *Gordon*, ante.[4]

We cannot leave this case without observing that the government was fortunate to have been saved in spite of itself by the court's action. There was no proper reason from the outset for including Count 1 in the indictment. If the purpose was to magnify the defendant's wickedness in the eyes of the jury beyond what was already stated in

[4] The government has not claimed that the concurrent sentences removed any prejudice even if there was multiplicity. These are exceptions to general principle, not always easy to determine. *See United States* v. *Ramos Algarin*, 1 Cir., 1978, 584 F.2d 562, 568. We need not decide whether the present case is one.

Counts 2 - 10, the motive was improper. *See United States* v. *Carter*, 3 Cir., 1978, 576 F.2d 1061, 1064; *United States* v. *Ketchum*, 2 Cir., 1963, 320 F.2d 3, 8, *cert. denied*, 375 U.S. 905. If the hope was that the court would impose long, consecutive sentences, it was an affront to the court's intelligence. Once the defendant had raised the matter, there was even less excuse for the government's doggedly adhering to its position. No possible cost would have been involved in nol prossing Count 1. At risk were not only three weeks of trial, but the entire indictment, in case our, we may add, unassisted, search of the record and the authorities proved unproductive. Yet the government persisted even to the point of trying to persuade the court to reverse its manifestly correct ruling on Count 10. Even on the government's own argument Count 10 was a repetition of the concealment alleged in Count 1. We hope we do not see a case like this again.

Affirmed.

APPENDIX "B"
DENIAL OF PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1058

UNITED STATES OF AMERICA,

Appellee,

v.

FERNANDO J. MONTILLA AMBROSIANI,

Defendant-Appellant.

JUDGMENT ENTERED 1/2/80

Order of the Court entered January 2, 1980. The petition for rehearing is denied and the District Court is directed to revoke the bail forthwith.

By the Court:

s/Dana H. Gallup, Clerk

cc: Messrs. Klein and Tellechea

APPENDIX "B-1"
PER CURIAM OPINION OF DENIAL OF REHEARING

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1058

UNITED STATES OF AMERICA,

Appellee,

v.

FERNANDO J. MONTILLA AMBROSIANI,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Hernan G. Pesquera, *U.S. District Judge.*]

On Petition for Rehearing

Before Coffin, *Chief Judge,*
Aldrich and Bownes, *Circuit Judges.*

Irwin Klein, for Petitioner.

January 2, 1980

PER CURIAM. The petition for rehearing is denied. We will, however, comment briefly upon some of the matters raised, not necessarily in the order of their importance.

1. Our criticism of government counsel did not mean that defendant did not get a fair trial. The thrust of our criticism was that a fair trial was obtained more through good fortune than good management on the government's part.

2. If, as is asserted, defendant's counsel "did not become aware of [the omission from the appendix] until after the opinion of the Court" he has no one to blame but himself. The statement in the petition that "this case appeared before this Court on the full record rather than under the appendix method" is simply not true. Defendant's own brief (*e.g.*, p. 7) cites the appendix. Manifestly counsel had it.

3. Defendant's argument that the district court could not "salvage" an indictment "originally defective from its inception because of multiplicity" proves altogether too much. Defendant is correct, but irrelevant, in stating that the indictment could not be broadened. We are concerned with the reverse, with narrowing of the indictment.

> "There is no prejudice in a court's trimming an indictment charging several acts of fraud where the court during the course of the trial determines that certain allegations will not lie . . . . " *New England Enterprises, Inc. v. United States,* 1 Cir., 1968, 400 F.2d 58, 62, *cert. denied,* 393 U.S. 1036.

By reducing the scope of Count 1 to eliminate multiplicity the court did not change the basic nature of the charge. There was no impropriety. *See, e.g., United States v. Colasurdo,* 2 Cir., 1971, 453 F.2d 585, 590, *cert. denied,* 406 U.S. 917; *Thomas v. United States,* 5 Cir., 1967, 398 F.2d 531; *United States v. Krepper,* 3 Cir., 1946, 159 F.2d 958,

971, *cert. denied,* 330 U.S. 824. If the court's charge in fact failed to make explicit to the jury the limited interpretation it had placed upon Count 1, this was a matter of which defendant should have complained below, and raised here. It is too late to do so by a petition for rehearing. We say this with particular emphasis in light of the facts of this case showing a minimum of prejudice. It is difficult to think the jury could have been misled.

4. Defendant's attempted refutation of our position that, prima facie, defendant was not prejudiced because of the concurrent sentences—on which we believe we might have rested our entire decision, although we chose not to do so—is totally specious. We cannot accept the charge that the court could have been misled into giving a prison sentence because of a misunderstanding of Count 1, when it was the court itself that had made the narrow interpretation of Count 1.

Counsel is reminded of that portion of F. R. Civ. P. 11 which states a basic principle, applicable to a petition for rehearing in a criminal case as well.

> ". . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."

The district court is instructed to revoke bail forthwith. First Circuit Rule 16.

APPENDIX "C"
EXTRACT OF PETITIONER'S BRIEF TO THE CIRCUIT COURT

POINT I

THE JURY VERDICT IS CONTRARY TO LAW UPON THE GROUNDS OF COLLATERAL ESTOPPEL AND DOUBLE JEOPARDY IN THAT THE INDICTMENT IS EITHER DUPLICITOUS OR MULTIPLICITOUS AND THE JUDGE SHOULD HAVE DISMISSED EITHER COUNT 1 OR COUNTS 2 THROUGH 9 OR REQUIRED THE PROSECUTOR TO MAKE SUCH SELECTION OF COUNTS FOR SUBMISSION TO THE JURY

The indictment in the case at hand is defective in that it is either duplicitous or multiplicitous. Generally, "multiplicity" is the charging of a single offense in more than one count, *United States v. Free,* 574 F.2d 1221 (5th Cir. 1978), whereas "duplicity" is the charging of several offenses in a single count, *United States v. Cohen,* 444 F. Supp. 1314 (E.D. Pa. 1978). At first glance, it appears that the indictment in question must be either duplicitous with respect to count 1 or multiplicitous with respect to counts 2 through 9. If count 1 charges a complete offense, ten counts 2 through 9 are mere restatements in more specific terms of count 1 and are therefore multiplicitous. If, on the other hand, counts 2 through 9 each charge a specific crime, then count 1 is duplicitous in charging more than one offense.

The general test for multiplicity is whether each one of the various counts requires proof of facts not necessary in any of the other counts, *United States v. Carter,* 576 F.2d 1061 (3d Cir. 1978); *United States v. Brodbeck,* 430 F. Supp. 1056 (D. Wis. 1977); and *United States v.*

Johnson, 298 F. Supp. 58 (S.D. Ill. 1969). The recognized danger of multiplicity in multicount indictments is the possibility that the jury will convict the defendant repeatedly on the same offense, thus impairing the defendant's rights to avoid the imposition of double jeopardy, and his fundamental rights of due process. Our courts recognize the danger of multiplicity in multicount indictments on the basis that the jury could infer guilt proven merely on one count to imply guilt on all other counts.

See: *United States v. U.C.O. Oil Co.,* 546 F.2d 833 (9th Cir. 1976); *United States v. Hearod,* 499 F.2d 1003 (5th Cir. 1974); and *United States v. Meriwether,* 486 F.2d 498 (5th Cir. 1973).

As applied to the case at hand, the tests for multiplicity are quite valid. Proof of the charge as stated in count 1 of the indictment would be identical with proof of any of the succeeding eight counts. It is clear on the facts that counts 2 through 9 of the indictment are multiplicitous and therefore should be dismissed under the applicable precedent. Two federal cases arising in New York, *United States v. Hughes,* 195 F. Supp. 795 (E.D.N.Y. 1961), and *United States v. Woody Fashions, Inc.,* 190 F. Supp. 709 (S.D.N.Y. 1961), have held that where counts in an indictment are multiplicitous, they should be consolidated and dismissed as separate counts. *Woody Fashions* is important to the instant case in that it presents an analogous situation.

In *Woody Fashions,* the defendants were indicted on various counts charging illegal dealing in misbranded wool products. The court held that although each count considered a different transaction, each count charged the same offense. The court held that where only a single course of conduct was alleged, only one count would be allowed to stand and the others dismissed. The instant case indicates a result similar to *Woody Fashions,* inasmuch as only a single offense is charged based upon a continuing

course of conduct; hence, only one indictment to that effect should be allowed. It appears here that the indictment is multiplicitous rather than duplicitous. The cases of *United States v. Starks,* 515 F.2d 112 (3rd Cir. 1975), and *United States v. Lubomski,* 277 F. Supp. 713 (S.D. Ill. 1967) recognize both defects of multiplicity and duplicity.

Generally, the test for determining whether a count in an indictment is duplicitous is whether the acts alleged in the count require proof of different facts, *United States v. Kearney,* 444 F. Supp. 1290 (E.D.N.Y. 1978), and *Cohen, supra.* In the case at hand, count 1 is duplicitous under this test if it alleges more than one act supporting a criminal charge and if such acts require a variance in the proof presented. The above cases also indicate that the prohibitions against duplicitous indictments are based upon the sixth amendment's guarantee of the right of an accused to know the charges pending against him and on fifth amendment prohibitions against double jeopardy. The duplicitous counts in the indictments in 2 to 9, are prohibited under these standards and should be dismissed.

The specific question posed by the consideration of duplicity with respect to count 1 of the indictment is whether the criminal acts alleged were part of a continuing transaction. If the acts are separate, then count 1 is duplicitous and should be dismissed. If the alleged acts are found to be part of a continuing transaction, then count 1 is not duplicitous, but rather the indictment is multiplicitous with respect to counts 2 through 9. Beyond this analysis, the question of whether the indictment is defective because of multiplicity of duplicity will turn on the finding of the court with regard to whether the acts complained of were part of a separate or continuing transaction.

The various tests dealing with multiplicity and duplicity indicate that either count 1 of the indictment is duplicitous, or counts 2 through 9 of the indictment

multiplicitous. The resolution of this issue will rest upon the court's determination whether the facts reflected in the indictment represents a single continuing transaction or a series of separate transactions. In the event that a single continuing transaction is held to apply, then the indictment is multiplicitous and all of the counts 1 through 9 should have been consolidated into one single count.

Not only are counts 2 through 9 multiplicitous and duplicitous with count 1, but also with each other inasmuch as only the dates are different. The proof proffered in support of count 1 was identical to the proof submitted in support of counts 2 through 9.

Thus it was manifestly improper in the very same case to attempt to prove the offense set forth in Count 1 wherein the indictment also contains eight counts (2 through 9) which are completely embodied in count 1. *Sealfon v. United States, supra,* 578-579; *United States v. Kramer,* 289 F.2d 909 (2nd Cir. 1961); *United States v. Sabella,* 272 F.2d 206 (2nd Cir. 1959); *Zdanok v. Glidden Company, etc.,* 272 F. 2d 944, 952-956 (2nd Cir. 1964); Note, *Developments in the Law, Res Judicata,* 65 Harvard Law Review 818, 874-878 (1952).

Although collateral estoppel does not have a constitutional basis, as does double jeopardy, nevertheless as a rule of evidence it prevents the use or reuse of the same evidence in a criminal case wherein the prosecution seeks to obtain convictions on more than one different charge arising out of the same facts and provable by the same evidence. See, e.g., *Hoag v. New Jersey,* 356 U.S. 464, 471 (1958); *Abbate v. United States,* 359 U.S. 187, 200 (1959). See the comprehensive opinion of Mr. Justice Sobel of the New York Supreme Court in *People v. De Sisto,* 27 Misc. 2d 217, 214 N.Y.S.2d 858 (1961), discussing this subject in depth, especially at pages 881-897 of 214 N.Y.S.2d.

One of the principal tests for determining the rule of double jeopardy, a constitutional rule to be sure, is the

"same evidence" test. That is, does the prosecutor rely upon the same evidence to establish the charge laid in count 1 as it did in counts 2 through 9? *Morgan v. Devine,* 237 U.S. 632 (1915); *United States v. Kramer,* 289 F.2d 909, 913 (2nd Cir. 1961).

In the *Sealfon* case, *supra*, where the unanimous court held that *"res judicata* may be a defense in second prosecution" which "operates to concludes those matters in issue which the verdict determined through the offenses be different," the court, also wrote as follows:

> "So interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts in each trial were identical."

In the *Sealfon* case, the defendant was tried on a substantive charge as an aider and abettor (§2, Title 18, United States Code), after having been acquitted on the conspiracy charges arising out of the same transaction. Under the doctrine of the cases of *Nye & Nissen v. United States,* 336 U.S. 613 (1949) and *Pinkerton v. United States,* 328 U.S. 640 (1946), proof of conspiracy may be used to establish the substantive offense by one who aids and abets another to commit the offense. This satisfied the "same evidence" test.

In the case at bar, the same evidence was used to prove the charge contained in Count I notwithstanding the proof of the charges contained in Counts 2 through 9 on that very same evidence.

Also see *United States v. Oppenheimer,* 242 U.S. 85 (1915); *United States v. Ball,* 163 U.S. 662, 669 (1896); *Fong Foo v. United States,* 369 U.S. 141 (1962); *Forman v. United States,* 361 U.S. 416 (1960). See e.g. *Sapir v. United States,* 348 U.S. 373, 374 (1955).

The result is the same, whether we style the prohibitions against use or reuse of the same facts under the names of *res judicata,* double jeopardy or collateral estoppel. See the opinions of Judge Friendly of this Court in the *Kramer* case, *supra,* and in *Zdanok* case, *supra.* In this case, as in the *Kramer* case, *supra*, there is no "mystery as to what was determined by the verdict of 'not guilty,' general though it was." Here the acquittal concluded all matters covered by the allegations of the conspiracy counts, as well as the facts supporting them. As Judge Friendly, further wrote:

> "More important, to permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rules against dsouble jeopardy long before it was enshrined in the Fifth Amendment, 3 Holdsworth, History of English Law, 614—and still longer before the proliferation of statutory offenses deprived it of so much of its effect. See Mr. Justice Brennan's separate opinion in *Abbate v. United States,* 1959, 359 U.S. 187, 196, 201 79 S. Ct. 663, 3 L. Ed. Id 729. The very nub of collateral estoppel is to extend *res judicata* beyond those cases where the prior judgment is a complete bar. The Government is free, within the limits set by the Fifth Amendment, see *United States v. Sabella,* 2 Cir. 1959, 272 F. 2d 206, 211 to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determmined against it on the first trial, no matter how unreasonable the Government may consider that determination to be."

See also the decision in *Marakar v. United States,* 370 U.S. 723 (1962), reversing, upon confession of error by the Solicitor General, the holding the Third Circuit (300 F.2d

513), which affirmed a judgment of conviction for a substantive narcotics violation after the defendants were acquitted of the conspiracy violation in a separate trial, involving the identical transaction.

Although many of the citations deal with a situation involving two separate indictments or cases, we cannot perceive of any difference, if both sets of such charges are contained in the same indictment but in different counts. Otherwise, prosecutors could by devious pleading, resort to lumping various and unassorted charges as different numbered counts of the same indictment and thereby hope to place such duplicity and multiplicity of charges outside the circumscribed ambit of protection for the individual.

The prosecutor's theory under counts 2 through 9 was barred by the double jeopardy provision of the Fifth Amendment or at least by the rule of law known as collateral estoppel or *res judicata.*

The judge should have made a determination as to multiplicity or duplicity.

> *United States v. C.I.T. Credit Corp.,* 344 U.S. 218, 225 (1952); *United States v. Ketchum,* 329 F.2d 3, 8 (2d Cir. 1963); *United States v. Saporta,* 270 F. Supp. 183, 186-87 (E.D.N.Y. 1967)." (underlining added)

His failure to do so mandates the dismissal of the indictment by this Court.

APPENDIX "D"
EXTRACT OF PETITIONER'S APPLICATION TO THE CIRCUIT COURT FOR REHEARING

The opinion of affirmance held in effect that Count 1 was multiplicitous. Nevertheless, the judgment of conviction was affirmed.

This Court found that "conceal" as contained in Count 1 included "falsify" as contained in the other eight counts.

This Court held that it was inappropo for the indictment to allege two offenses and impose two convictions as the result of one set of facts, all of which are essential elements of each crime. The Court further stated that presumptively Congress favors a single punishment for a single result, the method of accomplishment being merely incidental.

This Court agreed with the holding in *United States v. UCO Oil Co.,* 9 Cir., 1976, 546 F. 2d 833, cert. denied, 430 U.S. 966, which held that "Reason and fairness support the conclusion that only one offense is charged," where falsification and concealment were involved.

This Court went on to add that it found the government's claim of different elements in this case to be factually incorrect. In fact, this Court stated that there was no proper reason from the outset to include Count 1 in the indictment, particularly after the appellant had raised the issue of multiplicity.

Moreover, this Court severely criticized the prosecution for presenting such an indictment.

During trial at one point, the Trial Judge accepted the government's argument that concealment and false reports of the same receipts were separate offenses. At another point, during a side bar conversation, the Trial Judge came to the conclusion that multiplicity was avoided by treating the dollar figure in Count 1 as irrelevant.

This Court apparently approved of such distinction and found that based thereon there was no multiplicity.

* * *

The final sentence of this Court's opinion read as follows:

"We hope we do not see a case like this again."

The principles involved herein are of far reaching importance and likely to affect other persons similarly situated.

This Court disregarded the appellant's rights under the Fourth, Fifth and Sixth Amendments in that it overlooked the fact that an indictment which has been handed up by a grand jury may not be amended. In this case, the Court found that the indictment was defective for multiplicity and the Trial Judge had no right to try to sustain the indictment by resorting to sophistry and assumption. If the dollar amount was deleted from the indictment as suggested by the Trial Judge, then there would be no offense. Furthermore, throughout the entire trial, all that the jury heard was the dollar amount. In fact, how could the other eight counts of falsifying reports be proven without reference to dollar amounts? The omission of the dollar amount as suggested by the Trial Judge to counsel at the side bar was rarely argumentative. However, as a matter of proof, dollar amounts were presented to the jury. In any event, such argumentative assumption is merely a specious distinction but not a difference. Hence, the indictment was originally defective from its inception because of multiplicity and the attempt of the Trial Judge to salvage such invalid indictment amounts to an unlawful variance and amendment to the indictment in violation of the Fourth, Fifth and Sixth Amendments. The judge was bound by the four corners of the indictment and could not submit an altered and varied form thereof to the jury.

The Court overlooked and disregarded the following decisions: *Ex parte Bain,* 121 U.S. 1; *Garrett vs. U.S.,* 17 Fed. 2nd 479; *Stirone v. U.S.,* 361 U.S. 212; *U.S. vs. Norris,* 281 U.S. 619, 622; *Clyatt vs. U.S.,* 197 U.S. 207, 219, 220; *Jeffers vs. U.S.A.,* 392 F. 2d 749; *Epstein vs. U.S.A.,* 172 F.2d 734; *U.S. vs. Lippi,* 193 F. Supp. 441; *Sultan vs. U.S.,* 157 F. 2d 661; *Hoppet vs. U.S.,* 7 Crouch 389 3 L. Ed. 380; *Grimsley v. U.S.,* 50 F. 2d 509; *Gardella vs. Chandler,* 172 F. 2d 919,

In *Stirone vs. U.S.A.,* supra, the Court stated:

> "Ever since *Ex parte Bain,* 121 U.S. 1, was decided in 1887 it has been the rule that after an indictment has been returned, its charges may not be broadened through amendment except by the grand jury itself."

In *Jeffers vs. U.S.A.,* supra, the Court stated:

> "Neither this court nor the trial court is free 'to change the charging part of an indictment to suit its own motions of what it ought to have been, or what the grand jury would probably have made it if their attention has been called to suggested charges.' "

Appellant contends that this Court disregarded his rights of due process under the Fourth Amendment, his rights to be charged by a grand jury under the Fifth Amendment and his right to confrontation and be advised of the nature of the charges against him under the Sixth Amendment.

* * *

counsel contends that the Trial Judge had no authority and was without power to breath life into a defective indictment by altering the form thereof.

* * *

It would appear that even the Trial Judge recognized the defective multiplicity of Count 1 in relation to Counts

2 through 9 and accordingly resorted to a surgical distinction of removal of the dollar amount in order to try to validate an obviously defective indictment.

* * *

The court observed that the government was fortunate to have been saved in spite of itself by the Judge's action in removing the dollar amount at the side bar, thereby recognizing that the indictment as defective and multiplicitous.

Despite the criticism by this Court of the indictment and the hope expressed by the Court not to see such type of indictment again, nevertheless the judgment of conviction was affirmed. The effect of such words of criticism will inure to the benefit of a person accused of similar offenses in the future who will be protected from defective indictment such as this. However, the Court has overlooked the plight of this particular appellant whose appeal brought this sad situation to this Court's attention. Should he not receive the same protection? Is it not the duty of this Court to protect him as well as unknown future appellants from improper practices and defective indictments?

Mere naked criticism, unaccompanied by relief to this appellant who was the target and victim of such criticized indictment is merely pyrrhic and a denial of due process.

It seems incongrous that the appellant who was directly affected by such type of indictment should receive no relief therefrom, whereas future unknown defendants will be the beneficial recipients of such criticism. Query—How much judicial criticism is required before this appellant is entitled to relief by reason thereof? The atmosphere of the trial under the criticized indictment and conduct of the prosecutor was so unfair as to have denied the appellant of a fair trial and due process of law, as well as in violation of his rights under the Fifth and Sixth Amendment.

The Court overlooked and disregarded the fact that the concurrent sentences resulted in prejudice to the appellant.* We understand that the Trial Judge did not see fit to follow the recommendation of the Probation Department for non incarceration, and sentenced the appellant to a term of incarceration. The Trial Judge must have been influenced by Count 1 in so doing. Absent Count 1, the Trial Judge may very well have followed the recommendations of the Parole Officer for non incarceration. Hence the appellant's rights under the Eighth Amendment were thereby violated.

* * *

* (We have been informed that the pre-sentence Probation Report recommended no incarceration.)